

Decolonizing intertemporal international law

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As with many legal disputes concerning Europe's bloody colonial past, conversations about the Ovaherero and Nama's right to reparations from Germany often reach a dead end at the mention of intertemporal international law. Accordingly, one should judge the past by the legal standards of its time, not by our modern perceptions.

As the rules of the past were mostly nasty and brutish, the argument goes, the victims of colonial injustice and their descendants – “regrettably” – do not possess a right to reparations. This leaves their claims for redress of past atrocities, the consequences of which often reach well into the present, at the mercy of their former colonizers. A puzzling reversal of roles ensues: those who should beg the victim groups for forgiveness find themselves in the comfortable position of trading compensation for forgiveness, and those who might grant forgiveness as an act of grace beg for the grace of reparations. All this results from rules of intertemporal law. It is therefore high time to decolonize them. To change the rules entirely would – as the reader may guess – require the consent of all states, including the colonizers, and is therefore unlikely.

But there is another avenue, well known in theory though rarely used in practice. Legal interpretation offers tools to critically reread international law's past without changing it. It starts with observing that international law consists of language (treaties) and past practice. Accordingly, it does not work like a rack wheel, but like a chameleon. It changes its color with the context, and we might see widely different colors from different angles. Illustrative of this is an anecdote about [Samuel Maharero](#). When some Germans asked to buy his land, he allegedly gave them two buckets of sand. For the Germans, “land” was a determined part of the surface of the earth, while for Samuel Maharero, “land” could not be owned in that sense. Such ambiguity is intrinsic to many concepts in international law and the subject of much controversy. It sits uncomfortably with former colonial powers' defiant assertions that there are no legitimate claims to reparations.

A critical reading of international law can undermine such assertions. It exposes disputes among lawyers of different colonial powers, each coincidentally invoking the rules that best fit their country's interests; or disputes among lawyers of one country, where the dominant view is not necessarily the best informed or most consistent. It reveals that the colonized territories did not meet the test for *terra nullius* (a no man's land ready for occupation), as the colonizers' ignorance of the social and political organization of the colonized cannot rebound to the disadvantage of the latter. It investigates what a neutral observer would see as a protection agreement, or selling a piece of land. It undercuts the assertion that, at the time, international law was entirely separate from moral convictions. Well into the second half of the 19th century, international lawyers, for lack of precedent and shared practice, often

looked to sources of moral philosophy to determine what the law was. Finally, it also exposes the fact that 19th-century international law was presented as a just order not only to serve, but also to appease colonizers' increasingly self-conscious and often skeptical home audiences.

Is the prospect of critically reinterpreting international law's past utopian? Maybe. But it is certainly no less daunting than the assertion that some of the most heinous atrocities were legal. If former colonial powers were serious about setting the record straight, decolonizing intertemporal law would be an adequate starting point.

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